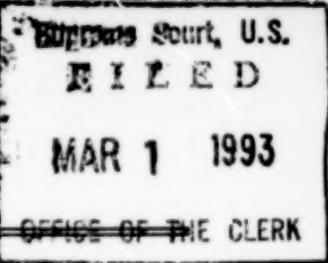


(5)
No. 92-6073



In The
Supreme Court of the United States
October Term, 1992

—♦—
RICHARD LYLE AUSTIN,

Petitioner,

v.

—♦—
UNITED STATES OF AMERICA,

Respondent.

—♦—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit**

—♦—
BRIEF FOR PETITIONER

—♦—
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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE CONCEPT OF PROPORTIONALITY ARISING FROM THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION SHOULD BE APPLIED TO THE FORFEITURE, UNDER 21 U.S.C. § 881(a)(4) AND § 881(a)(7), OF THE GARRETSON BODY SHOP AND THE 1972 HMET MOBILE HOME FROM RICHARD LYLE AUSTIN, THE OWNER OF SAID PROPERTY.

2. WHETHER WHEN A SHOWING IS MADE THAT THE FORFEITURE OF THE GARRETSON BODY SHOP AND THE 1972 HMET MOBILE HOME IS EXCESSIVE, THE GOVERNMENT MUST THEN SHOW THAT THE INTEREST ORDERED FORFEITED, NAMELY, THE AFORESAID PROPERTY, IS NOT SO GROSSLY DISPROPORTIONATE TO THE OFFENSE COMMITTED BY RICHARD LYLE AUSTIN, THE OWNER OF SAID PROPERTY, AS TO VIOLATE THE EIGHTH AMENDMENT AND THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE AND EXCESSIVE FINES CLAUSE CONTAINED THEREIN.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (J.A. 21) is reported at 964 F.2d 814.

JURISDICTION

The Decision of the United States Court of Appeals for the Eighth Circuit was entered on May 20, 1992. The Eighth Circuit Court of Appeals entered an Order Denying a Petition for Rehearing and Suggestion for Rehearing *En Banc* on July 2, 1992. The Petition for Certiorari was filed on September 30, 1992; and Certiorari was granted on January 15, 1993. The jurisdiction of this Court rests on 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Eighth Amendment to the Constitution provides as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The statutes involved in this case are: 21 U.S.C. § 881(a)(4) and 21 U.S.C. § 881(a)(7). They provide in pertinent part as follows:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that -

- (A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this title or title III;
- (B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and
- (C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by

reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

STATEMENT OF THE CASE

Richard Lyle Austin, the Owner, Claimant, and Petitioner in this case, was the owner of an auto body shop known as the Garretson Body Shop, located at 508 Depot Street in Garretson, South Dakota; and he was also the owner of a 1972 HMET mobile home, Serial Number 0356509G, located at 302 Dows Street in Garretson, South Dakota, and which was Austin's home. (J.A. 4). In this case, the Respondent, United States of America, contended that both the body shop and the mobile home were used to facilitate an illegal drug transaction; and, therefore, the Government sought forfeiture of Austin's auto body shop and his 1972 HMET mobile home, pursuant to 21 U.S.C. § 881(a)(4) and § 881(a)(7). (J.A. 5). The Government invoked jurisdiction of the District Court pursuant to 28 U.S.C. § 1345 and § 1355. The District Court granted the Government's Motion for Summary Judgment and entered a Decree of Forfeiture in regard to the Defendant property. (R. 32, 37). Austin appealed the District Court's Order Granting Motion for Summary Judgment to the United States Court of Appeals for the Eighth Circuit, which affirmed the District Court in an opinion filed on May 20, 1992. The United States Court of Appeals for the Eighth Circuit subsequently denied a Petition for Rehearing and Suggestion for Rehearing *En Banc* on July 2, 1992. (J.A. 29).

The 1972 HMET mobile home is larger than 240 square feet, measuring at the base thereof; and it is registered in South Dakota. (J.A. 16). The mobile home is valued at approximately \$3,000.00. (J.A. 5). Austin

described the mobile home as his homestead, "because I use it as my home." Although Austin was serving his sentence in the South Dakota State Penitentiary at the time of the appeal to the United States Court of Appeals for the Eighth Circuit, he intended to return to the mobile home after he was released from the penitentiary. (J.A. 16).

The Garretson Body Shop was Austin's "business and . . . (his) livelihood." The body shop was Austin's only means to earn a living. Austin has been in the auto body business for approximately twenty-five years, and he intended to live in Garretson and work at the body shop when he was released from prison. (J.A. 17) The body shop was valued at approximately \$33,600.00. (J.A. 4).

Although the District Court stayed the execution of the Decree of Forfeiture pending Austin's appeal to the Eighth Circuit Court of Appeals, after the Petition for Rehearing and Suggestion for Rehearing En Banc was denied, the District Court lifted the stay Order, (R. 47), and the mobile home and body shop have subsequently been sold.

The Affidavit of a South Dakota state detective, Donald Satterlee, attached to Plaintiff's Motion for Summary Judgment, indicated that on June 13, 1990, Keith Allen Engebretson drove to the Garretson Body Shop, located at 508 Depot Street, in Garretson, South Dakota, to purchase one gram of cocaine. The Affidavit also indicated that Keith Engebretson went into the Body Shop and transacted a deal with Richard Lyle Austin, owner and manager of the Body Shop, for cocaine. Satterlee's Affidavit then indicated that, "Austin then went from the body shop to his trailer, a 1972 HMET-mobile home bearing serial number 0356509G, located at 302 Dows Street, Garretson, South Dakota, came back and met Keith

Engebretson at the body shop, and exchanged two gram [sic] of cocaine for an unknown amount of money." (J.A. 13-14). In Satterlee's Affidavit in Support of Search Warrant, however, Satterlee stated that, "the Defendant then went from the Body Shop to his trailer, came back and met Keith Engebretson at the Body Shop, and exchanged one gram of cocaine for an unknown amount of money." Further, Donald Satterlee did not state specifically in either affidavit that Austin "had retrieved the cocaine from his trailer home;" but Satterlee stated in his Affidavit that, "Austin then went from the body shop to his trailer, . . . came back and met Keith Engebretson at the body shop, and exchanged two gram [sic] of cocaine for an unknown amount of money." (J.A. 14). Austin stated in his Affidavit that no money was given to him by Keith Engebretson in the Garretson Body Shop on June 13, 1990. (J.A. 17).

On June 14, 1990, the State of South Dakota obtained a search warrant by means of Satterlee's first Affidavit, and a search of the body shop and mobile home was conducted. As shown by the Return of Search Warrant and Inventory, a small amount of white powder and marijuana, paraphernalia, and currency were found in the Claimant's mobile home. Officers also found in the shop safe in the Body Shop \$3,300.00 in cash and an H & R .22 caliber revolver. (R. 27-28). Austin stated in his Affidavit that the revolver was filled with bird shot when it was seized; and that he only used the gun to shoot sparrows in his body shop. (J.A. 17). The officers also found a small amount of drugs and paraphernalia in a desk drawer in the body shop. (R. 28).

Austin was subsequently indicted on one count of Possession of a Controlled Drug, one count of Maintaining a Dwelling House for Keeping or Selling Drugs, one count of Possession of Controlled Drug with Intent to

Distribute, and one count of Possession of Less than One Ounce of Marijuana. On October 23, 1990, Austin pled guilty in state court to one count of Possession of Controlled Drug With Intent to Distribute, and the other three counts were subsequently dismissed. (R. 29). On January 28, 1991, Austin was sentenced to seven (7) years in the South Dakota State Penitentiary on that one count of Possession of Controlled Drug With Intent to Distribute, as indicated in the Judgment and Sentence, dated January 28, 1991.

On September 7, 1990, a Verified Complaint and Affidavit were filed by the federal government, alleging that the above-described property was used to facilitate an illegal drug transaction and was thereby subject to forfeiture under the appropriate statutes. (J.A. 3-6). Notice of the action was given to Austin on September 11, 1990; and on September 21, 1990, Austin filed his claim alleging ownership of the above-described property. On October 11, 1990, Austin filed an Answer denying the allegation of the Plaintiff and asserting certain affirmative defenses. (J.A. 9-11).

In his deposition and his Answers to Interrogatories, Austin invoked his Constitutional right under the Fifth Amendment of the United States Constitution to remain silent when asked questions which may incriminate him in regard to criminal proceedings. Both the deposition and the Answers to Interrogatories were given prior to Claimant's sentencing on January 28, 1991.

The Government moved for Summary Judgment; and Austin responded to the Motion appropriately. By its Order, dated April 8, 1991, the District Court granted the Government's Motion for Summary Judgment. Austin subsequently filed his Motion to proceed *in forma pauperis*, which was granted; and then Austin filed his Notice

of Appeal. The Court subsequently entered a Decree of Forfeiture in regard to the Defendant property. (R. 37).

The Eighth Circuit Court of Appeals affirmed the District Court's Order granting Summary Judgment on May 20, 1992. See *United States v. One Parcel of Property*, 964 F.2d 814 (8th Cir. 1992). In the Court's Opinion, Senior Circuit Judge, Floyd R. Gibson, "reluctantly" agreed with the Government that the Eighth Amendment did not apply to this case, because it is a civil forfeiture action. Judge Gibson continued:

We say "reluctantly" because we believe that the principle of proportionality is a deeply rooted concept in the common law as stated and described in *Solem v. Helm*, 463 U.S. 277, 284, 290-92, 103 S.Ct. 3001, 3009-11, 77 L.Ed. 2d 637 (1983), and that as a modicum of fairness, the principle of proportionality should be applied in civil actions that result in harsh penalties. However, we are restrained from so holding because of the decisions in prior cases on this issue hereinafter discussed.

Id. 964 F.2d 817. (J.A. 25). The Eighth Circuit Court of Appeals denied the Petition for Rehearing and the Suggestion for Rehearing *En Banc* on July 2, 1992. *Id.* at 818. (J.A. 29).

Austin subsequently petitioned this Court for Certiorari in a Petition filed on September 30, 1992. Certiorari was granted by this Court in an Order entered on January 15, 1993. (J.A. 30).

SUMMARY OF ARGUMENT

The history of the Eighth Amendment demonstrates that the concept of proportionality applies to forfeiture proceedings through its Excessive Fines Clause. The principle of proportionality, that a punishment should be proportionate to the crime, is deeply rooted in English

Common Law. Magna Carta required "amerements" to be proportionate to the wrong and also required that the "amerement" not be so large as to deprive a person of his livelihood. The term "amerements" later became equivalent to the term "fines"; and the English Bill of Rights of 1689, which contained the same language as the Eighth Amendment, incorporated the principle of proportionality from Magna Carta. When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights, therefore, they also adopted the English principle of proportionality. The protections encompassed by the English Bill of Rights of 1689 encompassed civil, as well as criminal, proceedings brought by the Sovereign.

Since the history of the Excessive Fines Clause shows that it is applicable to civil as well as criminal government sanctions, and since the broad civil forfeiture law leaves open the potential for wide Government abuse, the Excessive Fines Clause of the Eighth Amendment should apply to civil forfeitures under 21 U.S.C. § 881(1)(4) and § 881(a)(7).

The *in rem/in personam* distinction should not bar the application of the Excessive Fines Clause of the Eighth Amendment to forfeiture proceedings under 21 U.S.C. § 881(a)(4) and § 881(a)(7). This Court has applied Fourth Amendment and Fifth Amendment *in personam* protections to *in rem* proceedings which are quasi-criminal in character. Further, the forfeiture provisions of 21 U.S.C. §§ 881(a)(4) and (7) have innocent owner exceptions, and are predicated on violations of the Controlled Substances Act. Thus, the real objective of the forfeiture law is to impose a penalty upon those who are significantly involved in drug activity. Where an individual has suffered severe penalties in an *in rem* forfeiture proceeding, it is appropriate to address the substance of that proceeding, rather than adhering to the *in rem* fiction.

Applying the rationale of *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892 (1989), to the instant case, it is clear that the effect of the forfeiture of Petitioner's property cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes. Therefore, although denominated a civil proceeding, the civil forfeiture action against Petitioner constitutes punishment.

The Excessive Fines Clause of the Eighth Amendment provides a clearer basis for proportionality analysis of civil forfeiture proceedings under 21 U.S.C. § 881(a)(4) and 21 U.S.C. § 881(a)(7) than the cruel and unusual punishments clause. Factors developed by Circuit Courts in applying the objective criteria set forth in *Solem v. Helm*, 463 U.S. 277 (1983), are helpful, however, in fashioning an objective test that would assist this Court in focusing on the criminal activity that Congress strongly wishes to sanction under 21 U.S.C. § 881, and also in protecting individuals from Eighth Amendment abuses under the Excessive Fines Clause. Magna Carta, and its *amerements* clause, should also be considered in developing this objective test.

In applying the Excessive Fines Clause to the forfeiture of Petitioner's property under 21 U.S.C. § 881(a)(4) and (7), a threshold determination should be made whether the forfeiture is excessive. If the forfeiture is determined to be excessive, then the Government must show that the property ordered forfeited is not so grossly disproportionate to the offense committed as to violate the Excessive Fines Clause of the Eighth Amendment. The determination of whether the forfeiture is grossly disproportionate under the Excessive Fines Clause of the Eighth Amendment should be made taking several objective factors regarding the owner of the property and the property itself into consideration.

ARGUMENT

I. THE CONCEPT OF PROPORTIONALITY ARISING FROM THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION SHOULD BE APPLIED TO THE FORFEITURE, UNDER 21 U.S.C. § 881(a)(4) AND § 881(a)(7), OF THE GARRETSON BODY SHOP AND THE 1972 HMET MOBILE HOME FROM RICHARD LYLE AUSTIN, THE OWNER OF SAID PROPERTY.

A. The history of the Eighth Amendment shows that the concept of proportionality applies to forfeiture proceedings through the Excessive Fines Clause.

Richard Lyle Austin was the owner of the Garretson Body Shop, located at 508 Depot Street in Garretson, Minnehaha County, South Dakota. He was also the owner of the 1972 HMET mobile home, which was his residence and homestead. The auto body shop and mobile home were seized by the Government under 21 U.S.C. § 881(a)(4) and 21 U.S.C. § 881(a)(7). (See **STATUTES INVOLVED, *supra***, at page 1.) It is the Petitioner's contention that the concept of proportionality, which is inherent in the Eighth Amendment to the United States Constitution, should be applied to forfeiture of real and personal property under 21 U.S.C. § 881(a)(4) and 21 U.S.C. § 881(a)(7).

The Eighth Amendment to the Constitution of the United States provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The history of the Eighth Amendment demonstrates that the concept of proportionality applies to forfeiture proceedings through its Excessive Fines Clause.

Several previous cases before this Court have noted that ". . . it is clear that the Eighth Amendment was

'based directly on Art. I, § 9, of the Virginia Declaration of Rights,' which 'adopted verbatim the language of the English Bill of Rights.' " *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266, 109 S.Ct. 2909, 2916 (1989), quoting *Solem v. Helm*, 463 U.S. 277, 285 n.10, 103 S.Ct. 3001, 3007, n.10, 77 L.Ed.2d 637 (1983). "Clause 10 of the English Bill of Rights of 1689, like our Eighth Amendment, states that, 'excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted.' " *Browning-Ferris, supra*, 492 U.S. at 266, 109 S.Ct. at 2916. The principle of proportionality was familiar to English law at the time the English Bill of Rights was drafted. "The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence." *Solem v. Helm, supra*, 463 U.S. at 284, 103 S.Ct. at 3006-3007.

The history of the English Bill of Rights begins before the adoption of the Magna Carta. At some point after the Norman Conquest of England in 1066, the concept of "amercements" developed:

Amercements were payments to the Crown, and were required of individuals who were 'in the King's mercy,' because of some act offensive to the Crown. Those acts ranged from what we today would consider minor criminal offenses, such as breach of the King's peace with force and arms, to 'civil' wrongs against the King, such as infringing 'a final concord' made in the King's Court.

Browning-Ferris Industries, supra, 492 U.S. at 269, 109 S.Ct. at 2917. The majority opinion in *Browning-Ferris Industries* described an amercement as an "'all-purpose' royal penalty," which was used ". . . not only against plaintiffs who failed to follow the complex rules of pleading and against defendants who today would be liable in tort, but

also against an entire township which failed to live up to its obligations, or against a sheriff who neglected his duties." *Id.*

Although it has been said that "[a]n amercement was similar to a modern-day fine, it was the most common criminal sanction in 13th-century England," *Solem v. Helm, supra*, 463 U.S. at 284 n.8, 103 S.Ct. at 3006 n.8, citing 2 F. Pollock & F. Maitland, *The History of English Law* 513-515 (2d ed. 1909). Blackstone " . . . clearly thought that amercements were civil punishments." *Browning-Ferris Industries, supra*, 492 U.S. at 288, 109 S.Ct. at 2927 (O'Connor, concurring in part and dissenting in part, citing 4 W. Blackstone, *Commentaries on The Laws of England* 372). One commentator has also noted that the "amercement was assessed most commonly as a civil sanction for wrongfully bringing or defending a civil lawsuit." *Massey, The Excessive Fines Clause and Punitive Damages: Lessons from History*, 40 Vand.L.Rev. 1233, 1251 (1987).

The Magna Carta was a response to the frequent and occasionally abusive use of amercements by the King. "Magna Carta included several provisions placing limits on the circumstances under which a person could be amerced, and the amount of the amercement." *Browning-Ferris Industries, supra*, 492 U.S. at 270, 109 S.Ct. at 2918. In fact " . . . three chapters of Magna Carta were devoted to the rule that 'amercements' may not be excessive." *Solem v. Helm, supra*, 463 U.S. at 284, 103 S.Ct. at 3006. "The barons who forced John to agree to Magna Carta sought to reduce arbitrary royal power, and in particular to limit the King's use of amercements as a source of royal revenue and as a weapon against enemies of the Crown." *Browning-Ferris Industries, supra*, 492 U.S. at 271, 109 S.Ct. at 2918.

Chapter 20 of Magna Carta mandated a weighing of the fault and provided for specific limits on amercements, as follows:

"A Free-man shall not be amerced for a small fault; and for a great fault after the greatness thereof, saving to him his contenance; and a Merchant likewise, saving to him his Merchandise; and any other's villain than ours shall be likewise amerced, saving his wainage, if he fall into our mercy. And none of the said amerciaments shall be assessed, but by the oath of honest and lawful men of the vicinage. Earls and Barons shall not be amerced but by their Peers, and after the manner of their offense. No man of the Church shall be amerced after the quantity of his spiritual Benefice, but after his Lay-tenement, and after the quantity of his offense."

Browning-Ferris Industries, supra, 492 U.S. at 288-289, 109 S.Ct. at 2927 (O'Connor, concurring in part and dissenting in part), quoting 9 Hen. III, ch. 14 (1225). This Amercements Clause of Magna Carta limited the King's abusive use of amercements in four ways:

... by requiring that one be amerced only for some genuine harm to the Crown; by requiring that the amount of the amercement be proportioned to the wrong; by requiring that the amercement not be so large as to deprive him of his livelihood; and by requiring that the amount of the amercement be fixed by one's peers, sworn to amerce only in a proportionate amount.

Id. 492 U.S. at 271, 109 S.Ct. at 2918. Thus, the concept of proportionality was at the heart of the Amercements Clause of Magna Carta.

The term "amercements" later became interchangeable with the term "fines":

Fines originated in the 13th century as voluntary sums paid to the Crown to avoid an indefinite prison sentence for a common-law crime or to avoid royal displeasure. . . . The Crown gradually eliminated the voluntary nature of the fine by imposing indefinite sentences upon wrongdoers who effectively would be forced to pay the fine. *Once the fine was no longer voluntary, it became the equivalent of an amercement.* . . . Although in theory fines were voluntary while amercements were not, the purpose of the two penalties was equivalent, and it is not surprising that in practice it became difficult to distinguish the two.

Id. 492 U.S. at 289, 109 S.Ct. 2928 (O'Connor, concurring and dissenting) (emphasis added). "By the 17th century, fines had lost their original character of bargain and had replaced amercements as the preferred penal sanction. The word 'fine' took on its modern meaning, while the word 'amercement' dropped out of ordinary usage." *Id.* "In the 1680's the use of fines 'became even more excessive and partisan,' and some opponents of the King were forced to remain in prison because they could not pay the huge monetary penalties that had been assessed." *Id.* 492 U.S. at 267, 109 S.Ct. at 2916.

After James II fled England during the Glorious Revolution of 1688-1689, the House of Commons appointed a committee "to draft articles concerning essential laws and liberties that would be presented to William of Orange." *Id.* 492 U.S. at 290, 109 S.Ct. at 2928. "The group which drew up the 1689 Bill of Rights had firsthand experience; several had been subjected to heavy fines by the King's bench." *Id.* 492 U.S. at 267, 109 S.Ct. at 2916. The final draft of Article 10, which provided that "excessive Baile ought not to be required, nor excessive Fines imposed, nor cruel and unusual Punishments inflicted," was,

according to Blackstone, "only declaratory . . . of the old constitutional law." *Id.* 492 U.S. at 291, 109 S.Ct. at 2928 (O'Connor, concurring and dissenting), citing 4 Blackstone, *Commentaries* 372.

Of course the only prohibition on excessive monetary penalties predating Article 10 was contained in *Magna Carta*. "Since it incorporated the earlier prohibition against excessive amercements – which could arise in civil settings – as well as other forms of punishment, [Article 10's limitation on excessive fines] cannot be limited to strictly criminal cases but extends to monetary sanctions imposed in both criminal and civil contexts." Note, at 1717. Because the word "amercement" had dropped out of ordinary usage by the late 17th century, it appears that the word "fine" in Article 10 was simply shorthand for all monetary penalties, "whether imposed by judge or jury, in both civil and criminal proceedings."

Id. 492 U.S. at 291, 109 S.Ct. at 2928-2929, (quoting *Massey*, at 1256).

The majority in *Browning-Ferris Industries*, *supra*, indicated that: "The Framers of our Bill of Rights were aware and took account of the abuses that led to the 1689 Bill of Rights." *Id.* 492 U.S. at 267, 109 S.Ct. at 2916:

This history, when coupled with the fact that the accepted English definition of "fine" in 1689 appears to be identical to that in use in colonial America at the time of our Bill of Rights, seems to us clear support for reading our Excessive Fines Clause as limiting the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends.

Id. When "the Framers of the Eighth Amendment adopted the language of the English Bill of Rights, they

also adopted the English principle of proportionality.” *Solem v. Helm, supra*, 463 U.S. at 285-286, 103 S.Ct. at 3007:

Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection. . . .

Id. 463 U.S. at 286, 103 S.Ct. at 3007. As the history of the English Bill of Rights of 1689 shows, that “same protection” encompassed civil, as well as criminal, proceedings brought by the Sovereign.

Furthermore, in the First Congress, though there “was little debate over the Eighth Amendment . . . and no discussion of the Excessive Fines Clause,” consideration of the Eighth Amendment immediately followed consideration of the Fifth Amendment. *Browning-Ferris Industries, supra*, 492 U.S. at 294, 109 S.Ct. at 2930 (O’Connor, concurring and dissenting).

After deciding to confine the benefits of the Self-Incrimination Clause of the Fifth Amendment to criminal proceedings, the Framers turned their attention to the Eighth Amendment. There were no proposals to limit that Amendment to criminal proceedings. . . .

Id. One would think that if the Framers of the Constitution had intended to limit the Eighth Amendment to criminal proceedings, they could have as easily confined the benefits of the excessive fines clause to criminal proceedings.

The history of the Excessive Fines Clause of the Eighth Amendment argues for its application to forfeiture proceedings under 21 U.S.C. § 881(a)(4) and § 881(a)(7). The concept of “amercements” in Magna Carta and the concept of “fines” in Article 10 of the English Bill of

Rights of 1689 are akin to both civil and criminal forfeiture today. As this Court stated in *Ingraham v. Wright*, 430 U.S. 651, 670, n.39, 97 S.Ct. 1401, 1412 n.39 (1977), “[t]he applicability of the Eighth Amendment always has turned on its original meaning, as demonstrated by its historical derivation.” But also, as noted by Justice McKenna in *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910), “[t]ime works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of Constitutions.” *Id.* 217 U.S. at 373, 30 S.Ct. at 551. The “wider application” of the Excessive Fines Clause to civil forfeiture under 21 U.S.C. § 881(a)(4) and § 881(a)(7) has a solid basis in “its historical derivation.” By looking “to the origins of the [Excessive Fines] Clause, and the purposes which directed its Framers,” see *Browning-Ferris Industries, supra*, 492 U.S. at 264 n.4, 109 S.Ct. at 2914 n.4, it is clear that the Excessive Fines Clause should apply to the civil forfeiture of Richard Lyle Austin’s Garretson Body Shop and his 1972 HMET mobile home; and with the application of the Eighth Amendment Excessive Fines Clause to this case comes the application of the principle of proportionality, which is the fiber that binds together the Eighth Amendment.

B.

Clearly “troubled” by a forfeiture that deprived Austin of his home and business – essentially all of his assets, the Court of Appeals nonetheless felt constrained from applying an Eighth Amendment proportionality analysis, because of the technical distinctions between *in rem* and *in personam* and the civil nature of the forfeiture action:

We do not condone drug trafficking or any drug-related activities; nonetheless, we are troubled by the government's view that *any* property, whether it be a hobo's hovel or the Empire State building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction.

* * *

In this case it does appear that the government is exacting too high a penalty in relation to the offense committed, but we are limited by the technical legal distinctions regarding *in personam* and *in rem* actions, together with the clear court decisions that the Constitution does not require proportionality – at least, not in civil proceedings for the forfeiture of property.

United States v. One Parcel of Property Located at 508 Depot Street *supra*, 964 F.2d at 818. Petitioner contends, however, that an Eighth Amendment proportionality analysis is not precluded by this civil *in rem* label, on several alternate grounds: First, and most apposite, the text of the Excessive Fines Clause itself, when viewed along side the current scope and usage of forfeitures under 21 U.S.C. §§ 881(a)(4) & (7), strongly favors application of the Eighth Amendment to civil sanctions where the government stands to gain monetarily. Second, the *in rem* fiction should not bar application of an Excessive Fines proportionality analysis where, as here, civil forfeitures are at least quasi-criminal in nature. Finally, applying the Court's analysis in *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892 (1989), the forfeitures of Austin's mobile home and body shop under sections 881(a)(4) & (7) are, in effect, punishment, particularly to the extent that they exceed any remedial goals of the statute.

1.

The Excessive Fines Clause is applicable to civil as well as criminal government sanctions.

Both the historical context of amercements and fines and the Court's current pronouncements concerning civil actions demonstrate that the Excessive Fines Clause of the Eighth Amendment should apply to civil forfeiture actions brought by the government.

As the historical outline above suggests, amercements were an "all purpose royal penalty" used as both a criminal and a civil sanction for offending the Crown. See, *Browning-Ferris Industries*, *supra*, 492 U.S. at 269, 288, 109 S.Ct at 2917, 2927. Magna Carta's limits on the use of excessive amercements are historically traceable through the English Bill of Rights to the Eighth Amendment, although the term "amercement" gradually fell out of usage and was replaced with the term "fine":

Because the word "amercement" had dropped out of ordinary usage by the late 17th century, it appears that the word "fine" in Article 10 was simply shorthand for all monetary penalties, "whether imposed by judge or jury, in both civil and criminal proceedings." Massey, at 1256. Indeed, three months after the adoption of the English Bill of Rights, the House of Lords reversed a fine by referring to Magna Carta, and not to Article 10. See *Earl of Devonshire's case*, 11 State Tr. 1367, 1372 (H.L. 1689) (ruling that "fine" of 30,000 pounds for striking another was "excessive and exorbitant, against Magna Carta, the common right of the subject, and the law of the land.").

Id. 492 U.S. at 291, 109 S.Ct. at 2928-29 (O'Connor, concurring in part and dissenting in part). After tracing this history, Justice O'Connor concluded that there is a strong historical link between the Amendment and civil actions:

"If anything is apparent from the history set forth above, it is that a monetary penalty in England could be excessive, and that there is a strong line between amercements, which were assessed in civil cases, and fines. Cf. *Solem*, 463 U.S., at 284, n.8, 103 S.Ct., at 3006, n.8 (an 'amerce-ment was similar to a modern-day fine')." *Id.* 492 U.S. at 295, 109 S.Ct. at 2930.

Taking the analysis further, Justice O'Connor notes that the word "fine" currently "comprehends a forfeiture or penalty recoverable in a civil action. See Black's Law Dictionary 569 (5th ed. 1979); Webster's Third New International dictionary 852 (1971)," 492 U.S. at 297, and that early court authority around the time of the enactment of the Eighth Amendment lends historical support for this meaning:

The Massachusetts supreme Judicial Court held that the word "fine" in a statute meant "forfeitures and penalties recoverable in civil actions, as well as pecuniary punishments inflicted by sentence." *Hanscomb v. Russell*, 77 Mass. 373, 375 (1858). It explained that "the word 'fine' has other meanings" besides pecuniary penalties "inflicted by sentence of a court in the exercise of criminal jurisdiction . . . as appears by most of the dictionaries of our language, where it is defined not only as a pecuniary punishment, but also as a forfeiture, a penalty, [etc.]" *Id.*, at 374-375. The Iowa Supreme Court had the following to say about fines:

"The terms, fine, forfeiture, and penalty, are often used loosely, and even confusedly. . . . A fine is a pecuniary penalty, and is commonly (perhaps always) to be collected by suit in *some* form. A 'forfeiture' is a penalty by which one loses his rights and interest in his property." *Gosselink v. Campbell*, 4 Iowa 296, 300 (1856) (emphasis added).

Id. 492 U.S. at 296-297, 109 S.Ct. at 2931-32.

While the majority in *Browning-Ferris Industries* leaves open the issue of whether the Eighth Amendment applies to civil fines or forfeitures assessed by government action (as non-essential to the holding in that case), it at least suggested that such scrutiny may be warranted. For example, the Court specifically noted that "the government of Vermont has not taken a positive step to punish, as it most obviously does in the criminal context, nor has it used the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual." *Id.* 492 U.S. at 275, 109 S.Ct. at 2920 (emphasis added). In the accompanying footnote, note 21, the Court further cited *United States v. Halper*, as holding that "the Double Jeopardy Clause of the Fifth Amendment places limits on the amounts the Federal Government may recover in a civil action, after the defendant already has been punished through the criminal process." *Id.* Presumably, then, such a government enforced payment or forfeiture for revenue enhancement or disablement may implicate the Eighth Amendment.

More recently, Justice Scalia, without discussing the civil/criminal distinction, suggested in a footnote to a Cruel and Unusual punishment analysis that it makes sense to scrutinize governmental action more closely under the Excessive Fines Clause, because the State stands to benefit. *Harmelin v. Michigan*, 111 S.Ct. 2680, 2693 n.9 (1991), citing, by way of analogy, *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 25-26, 97 S.Ct 1505, 1519-1520, (1977) and *Perry v. United States*, 294 U.S. 330, 350-351, 55 S.Ct. 432, 435 (1935). In *United States Trust Co. of New York*, *supra*, the Court similarly noted, in the context of the Constitution's Contract Clause, that "an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a

legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *United States Trust Co. of New York v. New Jersey, supra*, 431 U.S. at 25-26. (emphasis added).

Indeed, "[i]n an eight month period during 1989, for example, the United States Attorney's office in the Eastern District of New York collected \$37,000,000 from civil forfeitures. This amount is four times what it cost to run that office during that period." Pratt and Petersen, *Civil Forfeiture In The Second Circuit*, 65 St. John's Law Review, 653, 671 (1991), (citing N.Y.L.J. July 27, 1989 at 1, col.5 & 21, col.5). It has also been reported that "[s]ince 1985, the federal government has harvested \$2.6 billion this way; it made 35,295 seizures in 1991, up 18 times in six years." See, "Where the Innocent Lose," *Newsweek*, January 4, 1993, p. 42.

In the case of forfeitures under 21 U.S.C. §§ 881(a)(4) & (7), the potential for government abuse is clear. Not only is there a financial incentive for the government to expand its grasp for monetary gain, but the procedural aspects of this forfeiture law actually assist the government action beyond the scope of even traditional civil actions. The forfeiture action under § 881 is nominally against the property, which may be seized without notice to the claimant and before any judicial proceeding. 21 U.S.C. § 881(b). The government then need only prove its case by probable cause, which can be based on circumstantial and otherwise inadmissible hearsay evidence. After that minimal showing, the burden then shifts to the claimant to prove either that the factual predicates for forfeiture have not been met – i.e. that the property was not used in connection with illegal activity, or that he qualifies for the innocent owner defense. Establishing either of these limited defenses has been noted by commentators to be fraught with difficulties. See, Pratt and

Petersen, *Civil Forfeiture In The Second Circuit*, 65 St. John's L. Rev. 653, 665-668 (1991). "In other words, the government can succeed without satisfying the preponderance of the evidence standard applicable in most civil suits." *Id.* at 665. With the broad scope of the permitted forfeiture, the government can easily strip one of all his property without the check of even common protections afforded to private parties in a civil context.

Thus, based on a history which strongly suggests that the Excessive Fines Clause applies to government imposed sanctions, civil as well as criminal, and the fact that the government in this case has both the financial incentive for and the procedural means to accomplish widespread abuse through forfeiture under § 881, the Court should hold that the Excessive Fines Clause of the Eighth Amendment applies to this sanction.

2.

The *in rem/in personam* distinction should not bar the application of the Excessive Fines Clause of the Eighth Amendment to forfeiture proceedings under 21 U.S.C. § 881(a)(4) and § 881(a)(7).

The *in rem/in personam* distinction, as applied to 21 U.S.C. §§ 881(a)(4) & (7), should not bar Petitioner from asserting a violation of his rights under the Excessive Fines Clause of the Eighth Amendment. Although the *in rem* doctrine has a long history in English and American jurisprudence, and though it may continue to serve some valid procedural need in reaching the contraband and illicit proceeds from drug trade, the fiction of placing the blame on the property in these two sections is so broad in scope and so intimately tied to provisions relating to criminal enterprise that the doctrine should not be allowed to impair Petitioner's individual right to be free from excessive fines.

In *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693, 85 S.Ct. 1246 (1965), the Court applied the Fourth Amendment to an *in rem*, civil forfeiture that involved property not intrinsically illegal in character – i.e. a car – even though “it” facilitated the illegal importing of liquor not bearing state tax seals. Citing *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524 (1886) for the proposition that a forfeiture proceeding is quasi-criminal in character, since “[i]ts object, like a criminal proceeding, is to penalize for the commission of an offense against the law,” (*id.* at 380 U.S. 700), the Court declined to restrict an application of the Fourth Amendment based on the *in rem* fiction:

This Court in *Boyd v. United States*, *supra*, 116 U.S. at 638, 29 L.Ed. at 753, rejected any argument that the technical character of a forfeiture as an *in rem* proceeding against the goods had any effect on the right of the owner of the goods to assert as a defense violations of his constitutional rights. The Court stated:

“[A]lthough the owner of goods, sought to be forfeited by a proceeding *in rem*, is not the nominal party, he is, nevertheless, the substantial party to the suit; he certainly is so, after making claim and defense; and, in a case like the present, he is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offense.”

Id. at 701, n.11. Similarly, in *United States v. United States Coin and Currency*, 401 U.S. 715, 91 S.Ct. 1041, 28 L.Ed.2d (1971), the Court rebuffed the government’s argument that the Fifth Amendment privilege against self incrimination should not apply in an *in rem* civil proceeding where the guilt or innocence of the actual owner of the

money may be irrelevant. Acknowledging, somewhat disparagingly, this “remarkable” fiction, the Court examined the forfeiture provision in its overall context:

For the broad language of [26 U.S.C.] § 7302 cannot be understood without considering the terms of the other statutes which regulate forfeiture proceedings. An express statutory provision permits the innocent owner to prove to the Secretary of the Treasury that the “forfeiture was incurred without willful negligence or without any intention on the part of the petitioner . . . to violate the law. . . .” 19 USC § 1618.

* * *

When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise.

Id. at 401 U.S. 721 (footnotes 8 & 9 omitted). Thus, the whole statutory scheme is relevant to this inquiry.

Like the internal revenue forfeiture provisions in *United States Coin and Currency*, *supra*, the forfeiture provisions of 21 U.S.C. §§ 881(a)(4) & (7) have innocent owner exceptions. Section 881(a)(7) goes even further, tying the forfeiture of real property to “a violation of this title punishable by more than one year’s imprisonment.” Moreover, section 881(d) provides that the provisions of law relating to “the remission or mitigation of such forfeitures” and “the compromise of claims shall apply to seizures and forfeitures incurred . . . under any of the provisions of this title. . . .” Finally, forfeiture under both §§ 881(a)(4) & (7) are predicated on violations of the Controlled Substances Act. Title II of Pub. L. No. 91-513, 84 Stat. 1242 (1970).

Thus, it is “manifest” here, as it was in *United States Coin and Currency*, that one real objective of these sections

– beyond the fiction that “the property is guilty of wrongdoing” – is to impose a penalty upon those who are significantly involved in a criminal enterprise. See also, the legislative pronouncements on § 881, *infra*, at I.B.3. The Eighth Circuit implicitly recognized this truth in Austin’s case (as have other courts of appeal troubled by the broad scope of forfeitures under this section), when it stated that “it does appear that the government is exacting too high a penalty in relation to the offense committed.” *United States v. One Parcel of Property, supra*, 964 F.2d at 818 (emphasis added). Perhaps the procedural advantages of *in rem* actions serve a purpose; perhaps not all Constitutional protections applicable to a criminal case should apply. Given the history of the Excessive Fines Clause and its protections against the disproportionate forfeiture of an individual’s property, Petitioner contends only that the Court should apply this clause to civil forfeiture actions that are quasi-criminal in nature, as it has under the fourth and fifth amendment cases of *Boyd*, *One 1958 Plymouth Sedan, and U.S. Coin & Currency, supra*.

Petitioner recognizes the apparent difficulties that some circuit courts of appeal have had in fully squaring this analysis with the Court’s holding in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080 (1974). However, *Calero-Toledo* did not overrule *Coin & Currency* but, rather, distinguished it factually. See *Calero-Toledo*, 416 U.S. at 668, 94 S.Ct. at 2904. The Court in *Coin & Currency* construed the statutes as a whole as containing a type of innocent owner exception that limited the forfeiture’s application where the “innocent owner” could “prove to the Secretary of the Treasury” that he did not willfully or intentionally violate the law. *Coin & Currency, supra*, 401 U.S. at 721. The statute in *Calero-Toledo* contained no such exception, nor did 21 U.S.C. § 881(a)(4)

in 1974. In 1984, however, Congress added the subparagraph (C) “innocent owner” exception to § 881(a)(4); at the same time, it added paragraph 881(a)(7), with similar innocent owner wording, plus the tie, in (a)(7), to “a violation punishable by more than one year imprisonment.” Petitioner contends that the holding in *Coin & Currency, supra*, is the better law to be applied to the Excessive Fines Clause analysis, under the statutory scheme involved here. At least the Second Circuit appears to agree:

In evaluating whether a forfeiture under 881(a)(7) serves its ostensible goals, we focus upon the effects on the claimant who has violated the statute, despite the fact that the forfeiture actions are brought *in rem*. See *Livonia Road*, 889 F.2d at 1270. See also *U.S. v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979), cert. denied, 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980) (for Eighth Amendment purposes, “there is no substantial difference between an *in rem* proceeding and a[n *in personam* criminal] forfeiture proceeding brought directly against the owner;) cf. *United States v. U.S. Coin & Currency*, 401 U.S. 715, 718, 91 S.Ct. 1041, 1043, 28 L.Ed.2d 434 (1971). Where an individual has suffered severe penalties in an *in rem* forfeiture proceeding, it is particularly appropriate to address the substance of that proceeding. See *United States v. One Leong Chinese Merchants Ass’n Bldg.*, 918 F.2d 1289, 1299 (7th Cir. 1990) (Cudahy, J., concurring); *United States v. Premises Known as 3639-2nd St., N.E.*, 869 F.2d at 1098 (Arnold, J., concurring).

United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, 954 F.2d 29, 36 (2d Cir. 1992).

The civil forfeiture action against Petitioner constitutes punishment, since the effect of forfeiture on Petitioner's property also serves a retributive or deterrent purpose.

Alternately, notwithstanding its "civil" denomination, application of sections 881(a)(4) & (7) was punitive as applied to Petitioner in this case, entitling him to Eighth Amendment protection. Although section 881 was clearly established as a civil remedy, the legislature's label is not itself determinative, since "civil proceedings may advance punishment as well as remedial goals. . . ." *United States v. Halper, supra*, 490 U.S. at 448, 109 S.Ct. at 1901. The Court in *Halper* stressed that "a particularized assessment of the specific penalty imposed and the purposes that the penalty may fairly be said to serve" is necessary to determine the true nature of the statute:

Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.

These goals are familiar. We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. See, e.g., *Kennedy v. Mendoza-Martinez*, 372 U.S. 44, 168, 83 S.Ct. 554, 567, 9 L.Ed.2d 644 (1963) (these are the "traditional aims of punishment"). Furthermore, "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives." *Bell v. Wolfish*, 441 U.S. 520, 539, n.20, 99 S.Ct. 1861, 1874, n.20 (1979). From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. Cf. *Mendoza-Martinez*, 372 U.S., at 169, 83

S.Ct., at 568 (whether sanction appears excessive in relation to its nonpunitive purpose is relevant to determination of whether sanction is civil or criminal).

Id. 492 U.S. at 448, 109 S.Ct. at 1901-02. Applying this practical approach, along with the objective factors that *Mendoza-Martinez*¹ bears on the inquiry, the statute as applied here also clearly served retributive and deterrent ends.

Congress expressly recognized the "penal nature" of this forfeiture statute in 1978 when it added the "proceeds forfeiture" amendment codified as section 881(a)(6): "Due to the penal nature of forfeiture statutes, it is the intent of these provisions that property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity which the statute seeks to prevent." Joint Explanatory Statement of Titles II and III, reprinted in 1978 U.S. Code Cong. & Adm. News 9518, 9522 (emphasis added). In 1984, Congress even more clearly stated its punitive goal of deterrence with the enactment of section 881(a)(7):

¹ The Court set forth seven factors in *Kennedy v. Mendoza-Martinez*, 372 U.S. 44, 168-69 (1963), that bear on the question of whether the enactment is deemed a punishment:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment – retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry. . . .

Id. (footnotes omitted).

Under current law, if a person uses a boat or car to transport narcotics or uses equipment to manufacture dangerous drugs, his use of the property renders it subject to civil forfeiture. But if he uses a secluded barn to store tons of marijuana or uses his house as a manufacturing laboratory for amphetamines, there is no provision to subject his real property to civil forfeiture, even though its use was *indispensable to the commission of a major drug offense and the prospect of the forfeiture of the property would have been a powerful deterrent.*

S Rep No 225 98th Cong 1st Sess 195, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3378 (emphasis added). Finally, in adding 881(a)(7), Congress expressly recognized that the "traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish" the drug trade. "Clearly, if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made." S Rep No 225, reprinted in 1984 U.S. Code Cong. & Admin News 3182, 3374.

In short, the punishment related concept of disabling, penalizing, and deterring are prevalent throughout the legislative discussion of the civil forfeiture provisions in section 881, particularly 881(a)(7). The express purpose appears generally aimed at inflicting an affirmative disability and deterring those individuals who are connected with drug activity.²

² One commentator has noted that "even the Justice Department acknowledges that the 'purpose of civil forfeiture is . . . to deter and punish criminal activity.'", citing 11 The Department of Justice Manual B-25 (Prentice-Hall Law & Business Supp. 1988-2), as stating: "Therefore, even if the property is

The intrinsic connection between forfeiture under sections 881(a)(4) and 881(a)(7) and criminal activity is also evident, particularly with respect to 881(a)(7). Forfeiture of conveyances under 881(a)(4) is expressly tied to controlled substances or material, products and equipment relating to controlled substances in violation of the criminal drug provisions of the Controlled Substances Act; section 881(a)(7) is similarly tied to violation of that criminal act. Although forfeitures under these sections can occur without an offense being charged, real property under 881(a)(7) can be forfeited only if it facilitates the commission of a violation of drug laws "punishable by more than one year's imprisonment." Moreover, these sections include limited, innocent owner provisions that would be seemingly anomalous to truly traditional civil proceedings. Finally, section 881(d) incorporates by reference administrative procedures for remission and mitigation of such forfeitures. Based on these connections to criminal acts, it appears that "[t]he main thrust of the civil forfeiture statutes is to attack or punish criminal behavior, not merely to act as a civil penalty for tortious conduct."³

Against this general background, the analysis must refocus, per *Halper*, on the nature of the sanction and the effect of the forfeiture in this particular case, to see if the sanction solely serves a remedial purpose or if it also serves either the retributive or deterrent purposes of punishment. In this case, there is no record that the federal government had any interest in Petitioner before

worth little, its forfeiture may nonetheless serve legitimate and overriding law enforcement objectives by depriving the wrongdoer of its use and availability." See, Note, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 Mich. L.Rev. 165, 189 (1990).

³ Note, *supra*, note 2, at 189.

his arrest on state charges. South Dakota state authorities investigated, arrested, charged, and ultimately punished Austin with imprisonment. The United States's remedial interest in interdicting drug activity would surely seem attenuated in this case, where state authorities had already accomplished that goal. On these facts it is difficult to conceive of any overriding interest of the federal government besides financial gain, retribution or deterrence. Even the recognized remedial goal of making the United States whole for the costs and expenses of pursuing Austin were presumably lessened because of the government's abbreviated involvement in his case. Consequently, at least on the instant record, this forfeiture cannot be fairly characterized as necessarily accomplishing that particularized remedial purpose.

Moreover, Austin's mobile home and the body shop were not in themselves contraband. Nor is there any indication in the record that the properties were purchased with illegitimate drug profits. Consequently, the forfeitures here do not solely serve the remedial goal of eliminating such illegal substances, products, materials, and equipment from commerce or of eliminating the profit of ill gotten gains. By the same token, the all-encompassing remedial purpose of ridding this country of the drug trafficking and addiction, while laudable, would apply analogously and generally to all crimes or social problems, and it is not helpful in the considered analysis of whether or not a sanction is truly, in effect, remedial or punitive.

The effect of the forfeiture against Austin "cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes." *Halper, supra*, 490 U.S. at 448, 109 S.Ct. at 1902. Effectually, the forfeiture of all of Austin's legitimately acquired interests in his home and

livelihood, though meager they were, was his economic ruin. Whether this served a retributive or a deterrent purpose is academic. Under the circumstances of this case, however, the forfeiture applied to Austin assumed the quality of punishment.

II.

WHEN A SHOWING IS MADE THAT FORFEITURE OF THE GARRETSON BODY SHOP AND THE 1972 HMET MOBILE HOME, OWNED BY RICHARD LYLE AUSTIN IS EXCESSIVE, THE GOVERNMENT MUST THEN SHOW THAT THE INTEREST ORDERED FORFEITED IS NOT SO GROSSLY DISPROPORTIONATE TO THE OFFENSE COMMITTED BY RICHARD LYLE AUSTIN AS TO VIOLATE THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT.

A.

The Excessive Fines Clause of the Eighth Amendment, rather than the Cruel and Unusual Punishments Clause, provides a clearer basis for proportionality analysis in this civil forfeiture proceeding.

First, it would appear from the Court's more recent pronouncements that the Excessive Fines Clause affords a clearer basis for a proportionality analysis of the civil forfeitures under consideration here, than does the Cruel and Unusual Punishments Clause. Whether one adopts Justice Scalia's discussion of the origin of the Cruel and Unusual Punishments Clause, set forth in *Harmelin v. Michigan*, 111 S.Ct. 2680, 2687-2696; or whether one adheres to the narrow proportionality principle enunciated in Justice Kennedy's Opinion, concurring in part and concurring in the Judgment, *Harmelin, supra*, 111 S.Ct. 2702-2709; or even whether one agrees with Justice White's dissent in *Harmelin v. Michigan*, 111 S.Ct. 2709-2719, and with the proportionality test set forth in

Solem v. Helm, supra, 463 U.S. at 290-292, 103 S.Ct. 3001, 3010-3011, it seems clear that the Cruel and Unusual Punishment Clause is more applicable to methods or modes of punishment or lengthy terms of incarceration, than it is to the seizure or forfeiture of property. It seems also true that the history of the Excessive Fines Clause and the concept of proportionality associated with it makes it the more appropriate clause in the Eighth Amendment to apply to the forfeiture of Petitioner's property under 21 U.S.C. § 881(a)(4) and (a)(7). The "excessive" language of the clause itself suggests a proportionality analysis. Moreover, one cogent reason for applying the excessive fines proportionality analysis to civil forfeiture cases is the unique financial incentive for government abuse, elucidated in Justice Scalia's Opinion in *Harmelin v. Michigan, supra*, 111 S.Ct. at 2693:

There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other Constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit.

Id. at 9. Thus, although the lower courts have often discussed forfeiture cases without clearly distinguishing between application of the two clauses, Petitioner's argument focuses primarily on the Excessive Fines Clause and its specific protections in this case.

Second, the standards for analyzing this protection have also been diverse and confusing in the lower courts. Petitioner argues that, in framing an objective test that would assist the judiciary both in focusing on the criminal activity that Congress strongly wished to sanction

under 21 U.S.C. § 881, and also in protecting individuals from Eighth Amendment abuses under the Excessive Fines Clause, several prior court cases are instructive as to the threshold criteria. However, for the reasons set forth below, those cases should not be determinative of the final standard. In arriving at the ultimate factors to employ in such a proportionality analysis, one should also account for the historical perspective of such fundamentals as the Magna Carta and the practical tests already routinely applied by the trial courts.

B.

A review of three recent circuit court of appeals decisions in the Second, Third, and Ninth Circuits, that attempt to apply an Eighth Amendment test, is instructive. The Second Circuit Court of Appeals in a civil forfeiture case, and the Ninth Circuit Court of Appeals in a criminal forfeiture case, have fashioned proportionality analyses using the three *Solem* factors of "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for a commission of the same crime in other jurisdictions." *Solem v. Helm, supra*, 463 U.S. 277, 290-292, 103 S.Ct. 3001, 3010-3011, 77 L.Ed.2d 637 (1983). The Third Circuit noted that the *Solem* standard may have a more restricted application after *Harmelin v. Michigan*, and suggested additional "helpful inquiries" in a proportionality analysis.

The Second Circuit Court of Appeals applied the *Helper* threshold analysis to a civil forfeiture action and concluded that the forfeiture constituted punishment within the meaning of the Eighth Amendment and that the sanction was excessive.

The Second Circuit Court of Appeals applied the Eighth Amendment to civil forfeiture under 21 U.S.C. § 881(a)(7) in *United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, New York*, 954 F.2d 29 (2nd Cir. 1992). In that case, the appellant appealed from a judgment of forfeiture under 21 U.S.C. § 881(a)(7), which deprived him of his residence. The evidence showed that appellant had twice sold cocaine inside his condominium to a confidential informant. Appellant later pled guilty to attempted criminal sale of a controlled substance; and the government commenced forfeiture proceedings pursuant to 21 U.S.C. § 881(a)(7) against his personal residence. The District Court granted the government's cross motion for summary judgment, and judgment of forfeiture was entered. *Id.* 954 F.2d at 32-33. The Second Circuit Court of Appeals read *Helper* to apply to civil forfeitures in certain circumstances: "Forfeitures that are overwhelmingly disproportionate to the value of the offense must be classified as punishment unless the forfeitures are shown to serve articulated, legitimate civil purposes." *Id.*

The Court then held that a forfeiture under 21 U.S.C. § 881(a)(7) would not be presumed punitive where the seized property "had been used substantially to accomplish illegal purposes, so that the property itself can be said to be 'culpable' or an instrumentality of crime." *Id.* 954 F.2d at 36 (emphasis added). The Court stated that,

"[w]here the seized property is not itself an instrumentality of crime, however, and its total value is overwhelmingly disproportionate to the value of controlled substances involved in the statutory violation, there is a rebuttable presumption that the forfeiture is punitive in nature." *Id.* Since the value of the appellant's interest in the residence was "close to three hundred times the value of cocaine sold inside it," the Court found as a matter of law "that the forfeiture is overwhelmingly disproportionate compared to the value of the relevant drug transactions, and that therefore a rebuttable presumption that the forfeiture is punitive in nature is created." *Id.* 954 F.2d at 37.

In a footnote, the Court indicated that appellant appeared to mention, but did not press, the possibility that the Excessive Fines Clause might apply to sanctions purely civil in nature. The Court Accordingly declined to address that issue. *Id.* 954 F.2d at 38, n.3. Regarding Excessive Fines Clause applicability, the Court stated that, ". . . the Supreme Court has provided no guidance, except to observe that fines must be closely scrutinized because they benefit the government." *Id.* 954 F.2d at 39. Nevertheless, the Court of Appeals concluded in dicta that it did not need to decide at exactly what point a fine or forfeiture might violate the Excessive Fines Clause, since the forfeiture in that case would be proper wherever such a line could be drawn. *Id.* 954 F.2d at 39.

The importance of the Second Circuit case is that it applied the *Helper* threshold analysis to a civil forfeiture action and concludes that the forfeiture constitutes punishment within the meaning of the Eighth Amendment and that the sanction was excessive. Also relevant to Petitioner's argument is the statement by the Court of Appeals that:

While we are extremely sympathetic to the need to address our nation's serious narcotics problems, we do not believe that a disproportionately large forfeiture can be reasonably justified as a civil fine as opposed to punishment by placing full responsibility for the "war on drugs" on the shoulders of every individual claimant. This is particularly so where the individual claimant's violations are relatively minor.

Id. 954 F.2d at 37.

The case is not particularly instructive, however, to the Excessive Fines Clause analysis. The Second Circuit Court of Appeals was not pressed with an argument that the Excessive Fines Clause applies to civil forfeitures under 21 U.S.C. § 881(a)(7). Therefore, its ultimate holding should not be applied to Petitioner's case; and its comments regarding the Excessive Fines Clause are merely dicta. Further, the Court of Appeals applied the criteria or factors from *Solem v. Helm*, which are more appropriately applied to punishments under the Cruel and Unusual Punishments Clause of the Eighth Amendment. Moreover, the Court did not consider the historical background of the Excessive Fines Clause and its connection with the Amercements Chapter of Magna Carta.

2.

The Ninth Circuit Court of Appeals has applied a proportionality analysis to criminal forfeiture cases, with some relevant factors to this civil forfeiture case.

The criminal forfeiture cases under the Racketeer Influences and Corrupt Organizations Act, 18 U.S.C. §§ 1969 et seq. (1982) (RICO) are also instructive as to a proportionality analysis in civil forfeiture cases. In *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987), the Ninth Circuit Court of Appeals held that forfeiture under § 1963(a) of RICO "is clearly 'punishment' as that term is

used in the Eighth Amendment." *Id.* 817 F.2d at 1413. The *Busher* Court held that ". . . where, as here, plaintiff makes a *prima facie* showing that the forfeiture may be excessive, the District Court must make a determination, based upon appropriate findings, that the interest ordered forfeited is not so grossly disproportionate to the offense committed as to violate the Eighth Amendment." *Id.* 817 F.2d at 1415: The Court of Appeals indicated that the District Court did not take "these constitutional considerations into account in fashioning its forfeiture order," and the Court of Appeals remanded the case to the District Court to do so. *Id.* The Court then indicated as follows:

Because the Eighth Amendment, as interpreted in *Solem*, embodies fluid concepts that vary in application with the circumstances of each case, there is relatively little guidance we can give the District Court in making its determination. We do, however, offer the following observations.

* * *

The District Court must, consistent with *Solem* consider (1) the harshness of the penalty in light of the gravity of the offense; (2) sentences imposed for other offenses in the federal system; and (3) sentences imposed for the same or similar offenses in other jurisdictions. 463 U.S. at 292, 103 S.Ct. at 3010. In comparing the penalty imposed to the gravity of the offense, the District Court may consider the circumstances surrounding the defendant's criminal conduct. . . . More particularly, *Solem* noted that, in considering the gravity of the offense, a court should look both at the harm suffered by the victim and the defendant's culpability. 463 U.S. at 292, 103 S.Ct. at 3010.

Id. The Court also stated that the District Court should take into account the magnitude of the harm caused by

defendant's conduct, "the dollar volume of the loss caused, whether physical harm to persons was inflicted, threatened or risked, or whether the crime had severe collateral consequences, e.g., drug addiction. . . . In addition, the Court may consider the benefit reaped by the convicted defendant." *Id.*

Referring again to *Solem v. Helm, supra*, the Court of Appeals said that the defendant's state of mind and his motive in committing the crime should be considered with regard to the defendant's culpability. *Id.* The Court of Appeals continued:

In the context of RICO, the Court may consider the degree to which the enterprise operated by the defendant is infected by criminal conduct. The Court should be reluctant to order forfeiture of a defendant's entire interest in an enterprise that is essentially legitimate where he has committed relatively minor RICO violations not central to the conduct of the business and resulting in relatively little illegal gain in proportion to its size and legitimate income. Conversely, if illegal activity accounts for almost all of an enterprise's activity, or almost entirely with ill-gotten funds, it would not normally violate the Eighth Amendment to order forfeiture of all of defendant's interest in that enterprise.

Id. at 1415-16.

The Court of Appeals instructed the District Court that if, on remand of the case, the District Court found that the forfeiture was so disproportionate to the offense as to violate the Eighth Amendment, then "it must limit the forfeiture to such portion of the interest as it deems consistent with these principles; or it may condition the forfeiture upon payment of such sum or relinquishment of such other property as seems just under the circumstances; or it may limit or eliminate other punishment it

would otherwise impose so as to bring the total sanction within Constitutional boundaries." *Id.* at 1416.

Thus, while the Ninth Circuit Court of Appeals in *Busher* recognized the *Solem* criteria, it essentially expanded on these factors and introduced several additional specific inquiries in its proportionality analysis under the Eighth Amendment. Despite the criminal forfeiture nature of *Busher*, many of the factors set forth therein could also apply to a proportionality analysis of civil forfeiture under the Excessive Fines Clause of the Eighth Amendment.

3.

The Third Circuit Court of Appeals has also applied a proportionality analysis to criminal forfeiture proceedings.

In the recent case of *United States of America v. Michael Sarbello*, No. 91-5327, 1993 U.S. App. LEXIS 1553 (1993), (filed on February 2, 1993), another RICO case, the Third Circuit Court of Appeals held that the District Court "may reduce the statutory penalty, a mandatory 100% statutory criminal forfeiture, in order to conform to the Eighth Amendment." The Court also held that *Sarbello* established a *prima facie* showing of an Eighth Amendment infringement, justifying a remand for "a more than summary finding as to whether the forfeiture provision of the statute as applied to *Sarbello*'s interest in the RICO enterprise is either an unconstitutionally 'cruel and unusual punishment' or an 'excessive fine.'" 1993 U.S. App. LEXIS 1553 (1993), p. 3. The Third Circuit Court of Appeals also referred to *Solem v. Helm, supra*, and the three objective factors which guide Eighth Amendment review. *Id.* pp. 9-10. The Court indicated, however, that the *Solem* standard "was placed in question by the Court's recent decision in *Harmelin v. Michigan*, 111 S.Ct.

2680 (1991)". *Id.* p. 10. Nevertheless, the Court held that "the Eighth Amendment requires that a criminal RICO forfeiture order be justly proportioned to the charged offense." *Id.* p. 11. The Court of Appeals then set forth factors that the District Court should consider in its proportionality analysis:

We note that a district court's proportionality analysis, while it will not in every case be extensive or encompass the three factors set forth in *Solem*, must necessarily accommodate the facts of the case and weigh the seriousness of the offense, including the moral gravity of the crime measured in terms of the magnitude and nature of its harmful reach, against the severity of the criminal sanction. Other helpful inquiries might include an assessment of the personal benefit reaped by the defendant, the defendant's motive and culpability, and, of course, the extent that the defendant's interest and the enterprise itself are tainted by criminal conduct.

... The language of the Eighth Amendment demands that a constitutionally cognizable disproportionality reach such a level of excessiveness that in justice the punishment is more criminal than the crime.

Id. p. 12. The Court held that, "[u]pon a prima facie showing of gross disproportionality by the defendant, the Eighth Amendment requires more than a conclusory finding that 100% forfeiture is within constitutional limits." *Id.* p. 13. Because the District Court did not examine the factors essential to a proportionality analysis, the Court of Appeals remanded the issue for a proportionality analysis in keeping with its opinion. *Id.*

Federal District Courts traditionally use a case-by-case proportionality analysis in assessing fines and setting bail.

These cases show to some extent the lower courts' reluctance to rely solely on the three factors of the *Solem* test. All three seemingly applied some form of the first factor, comparing the gravity of the offense and the harshness of the penalty. However, the second two factors have an anomalous application to forfeiture cases, particularly in the civil context, since total forfeitures of all of one's property, unlike specific punishments tied to specific crimes, can occur whether one gram of a controlled substance is involved or a ton. Thus, while some proportionality is arguably inherent in sentencing, little appears to be involved in the forfeitures under statutes such as § 881. Consequently, these courts developed other factors to use in a case by case analysis.

Addressing the standards set forth in *Solem v. Helm, supra*, and as applied to the civil forfeiture arena in *U.S. v. Certain Real Property and Premises, supra*, as one commentator said:

... Because section 881 authorizes forfeiture in even the most minimal cases, the factors of individual cases should be weighed.

Case-by-case analysis of forfeitures would follow the requirements of the excessive fines clause. While the cruel and unusual punishment clause may seem, on its face, focused on specific types of punishments that can be identified in the abstract, the excessive fines clause seems to require considering each case individually. An absolute rule, that all fines over a certain dollar amount are excessive would make little sense. Rather, "excessive" depends upon the context of a certain case.

Note, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 Mich. L. Rev., 165, 206 (1990). As Mr. Speta notes in this article, the lower courts traditionally use a case-by-case weighing in many similar areas, such as in assessing fines and in setting bail. For example, the federal district courts use individualized factors in deciding a proper sentence.⁴

⁴ Cf. 18 U.S.C. § 3572(a) (1988), which reads in part as follows:

Imposition of a sentence of fine and related matters

(a) **Factors to be considered.** – In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553(a) –

(1) the defendant's income, earning capacity, and financial resources;

(2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person . . . that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;

(3) any pecuniary loss inflicted upon others as a result of the offense;

(4) whether restitution is ordered or made and the amount of such restitution;

(5) the need to deprive the defendant of illegally obtained gains from the offense;

* * *

18 U.S.C. § 3553(a) (1988) provides:

The court in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

Moreover, when preventive detention is not an issue, "courts follow the factor analysis described by Congress in setting bail. These factors have been held to protect against the imposition of excessive fines." *Id.* at 207-208 (footnotes omitted).

5.

A proportionality analysis should not overlook the amercements clause of Magna Carta.

In applying a proportionality analysis, under the Eighth Amendment Excessive Fines Clause, to Petitioner's case, this Court should not overlook the earliest historical source of the Excessive Fines Clause, namely, Magna Carta. The amercements clause of Magna Carta provided that a "Free-man shall not be amerced for a small fault; and for a great fault after the greatness thereof, saving to him his contentment; and a Merchant likewise, saving to him his Merchandise; and any other's villain than ours shall be likewise amerced, saving his wainage, if he fall into our mercy." Chapter 20 of Magna Carta, 9 Hen. III, CH. 14 (1225). The term "contentment" means "a man's countenance or credit, which he has together with, and by reason of, his freehold; or that which is necessary for the support or maintenance of men, agreeably to their several qualities or states of life." *Black's Law Dictionary*, (fifth edition) (1979). The term "wainage" meant, in Old English Law, "the team and

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant;

* * *

instruments of husbandry belonging to a countryman, and especially to a villein who was required to perform agriculture services." *Id.* The amercements clause of Magna Carta stands for the rule that the amount of the amercement should be proportioned to the wrong, and that it should not be so large as to deprive the "Free-man", "Merchant", or "villain" or his livelihood or means to earn a living; and whether the amercement be against a "Free-man", "Merchant", "villain", "Earl", "Baron", or "man of the Church", it must be in a proportionate amount. *See Browning-Ferris Industries, supra.*

The Court should also consider, as described at length above, the historical development of the proportionality analysis in Eighth Amendment jurisprudence, from Magna Carta, through the English Bill of Rights of 1689, to Article I, § 9 of the Virginia Declaration of rights, to the Eighth Amendment and its Excessive Fines Clause.

6.

The Court should adopt a two-pronged analysis in applying the Excessive Fines Clause to civil forfeiture cases under 21 U.S.C. §§ 881(a)(4) and (7), in order to determine whether the forfeiture violates the Eighth Amendment.

Based on the above discussion, Petitioner contends that the Court should use the following factors in applying the Excessive Fines Clause to the forfeiture in this case, under 21 U.S.C. §§ 881(a)(4) & (7):

A *prima facie* or threshold determination that the forfeiture is excessive shall be established if:

1. the value of the property seized is excessive compared to the value of the controlled substances involved in the statutory violation; and,

2. the value of the property seized is excessive relative to the financial condition of the owner.

This restrictive threshold test would greatly reduce the need for any further inquiry where either the amount of the controlled substances involved was substantial or the seized property was only a relatively small part of the owner's assets.

Once a *prima facie* or threshold finding of excessiveness is made, the government must then show that the property ordered forfeited is not so grossly disproportionate to the offense committed as to violate the Excessive Fines Clause of the Eighth Amendment. In determining whether the forfeiture is grossly disproportionate under that clause, the court should take the following factors into consideration:

1. Whether the property seized constitutes the owner's livelihood or means to earn a living.
2. Whether the property seized is the owner's homestead.
3. The degree to which the owner's property has been involved in drug activity, and whether the property has been purchased or obtained through the proceeds of drug activity.
4. Whether or not the owner has been convicted of a crime related to the forfeiture, the severity of the crime, and the severity of the criminal sentence imposed upon the owner of the property - i.e. the total punishment imposed on the owner, including the forfeiture.
5. The extent of the criminal behavior of the owner of the property and the need for deterrence.

6. The extent to which the government necessarily expended its funds to interdict drug activity involving this property.

All of these factors are appropriately objective and determinations that are traditionally made by the trial courts in weighing various issues before them, such as sentencing. The first factor was a consideration stressed repeatedly by Magna Carta's amercement clause - i.e. that an individual should not be deprived of his livelihood. The second, is a traditionally protected property to some extent under both state homestead laws⁵ and federal bankruptcy laws. Under the third factor, consideration should be given to the extent that the property is tied to drug activity and whether or not it has been acquired with the proceeds of drug activity. Fourth, at least some consideration should be given to the amount of the total punishment, if the owner has also been punished in a criminal action. Fifth, the owner's overall criminal background may have a bearing on whether or not a large forfeiture is necessary as a deterrent to further criminal conduct. Finally, the government should have an opportunity to recover its demonstrated, necessary expenses arising in connection with its interdiction of drug activity on the property.

After considering these factors, the District Court should have the option of ordering a forfeiture of less than 100% of the owner's assets, as deemed consistent

⁵ For example, S.D. Codified Laws Annot. §§ 43-31-1 & 2 (1983) provide for a homestead exemption from judicial sale, judgment lien, and mesne or final process, including a mobile home, without motive power, that is larger than two hundred forty square feet, measuring at the base thereof. S.D. Codified Laws Annot. § 43-45-3 (1983) further provides for a \$30,000.00 absolute exemption for the proceeds of the sale of a homestead, for a period of one year.

with these factors, or conditioning the forfeiture upon payment of such sum or relinquishment of such other property as seems just under the circumstances.

Petitioner clearly meets the threshold considerations in this case. The value of the forfeited property is overwhelmingly disproportionate to the value of the controlled substances involved in the statutory violation. The forfeiture further took substantially all of Petitioner's assets, as demonstrated by his *in forma pauperis* status in this case.

Application of the remaining factors to Petitioner's case shows that: (1) the Garretson Body Shop was the Petitioner's livelihood or means to earn a living; (2) the 1972 HMET mobile home was the Petitioner's homestead; (3) there is only evidence of one drug transaction and there is no evidence that the Petitioner's Garretson Body Shop or mobile home were purchased with the proceeds of drug activity; (4) Petitioner was convicted of possession of a controlled drug with the intent to distribute and sentenced to seven years in the South Dakota penitentiary; (5) there is no indication in the records that the Petitioner had ever been charged with any drug-related crime until the charges prior to the civil forfeiture proceeding; (6) here South Dakota state authorities had already accomplished the goal of interdicting this drug activity.

The above considerations establish, under the circumstances of this case, that the forfeiture of Petitioner's property was grossly disproportionate. Thus, Petitioner contends that this case should be remanded to the District Court for a determination of whether this forfeiture is so grossly disproportionate to the offense committed by Petitioner as to violate the Eighth Amendment's Excessive Fines Clause.

Although the application of these factors by the District Court may be difficult, the language of the Ninth Circuit Court of Appeals in *U.S. v. Busher, supra*, is instructive:

This is, admittedly, not an easy line to draw; the Eighth Amendment does not provide a bright line separating punishment that is permissible from that which is not. But a Court may not turn its back on a Constitutional constraint simply because it is difficult to apply.

U.S. v. Busher, supra, 817 F.2d, at 1416.

CONCLUSION

Based upon the foregoing authorities and arguments, the Decision of Eighth Circuit Court of Appeals in the above-entitled matter affirming the Order Granting Summary Judgment by the United States District Court for the District of South Dakota, should be reversed; and the case should be remanded to the District Court for determination, based on factors set forth herein, whether the forfeiture of the Petitioner's property in this case is so grossly disproportionate to the offense committed by Petitioner as to violate the Eighth Amendment Excessive Fines Clause.

Respectfully submitted,

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